SUPREME COURT, U. S.

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No. 190

# In the Supreme Court of the United States

OCTOBER TERM, 1968

OTHELL CAMPBELL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 20, 1968. The petition for a writ of certiorari was filed on June 13, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### QUESTION PRESENTED

Whether observations of federal agents from petitioner's cornfield constituted an unlawful search.

### STATEMENT

After a nonjury trial in the United States District Court for the District of South Carolina, petitioner

was convicted on one count charging unlawful possession of whiskey to which required tax stamps had not been affixed. 26 U.S.C. 5604(a)(1). He was sentenced to three years' imprisonment with provision for parole at such time as the Board of Parole may determine. The court of appeals affirmed (Pet. App. A).

The evidence, developed both at the trial and at a pretrial motion to suppress,[1] showed the following. At about 7:00 p.m. on October 10, 1966, A.T.T.U. Agents Echerd and Armstrong concealed themselves in a cornfield approximately fifty to seventy feet from petitioner's dwelling. They acted on information received from a proven reliable source that petitioner, who they knew had a prior record of liquor violations, was trafficking in illicit whiskey (Tr. II, 20–22). To reach their vantage point, the agents crossed petitioner's woods and climbed an old barbed-wire fence at the back edge of his cornfield (Tr. II, 36, 42; Tr. III, 16). A yard with an unpaved driveway separated the cornfield from petitioner's dwelling (Tr. II, 6–11, 38; Tr. III, 15; see Exh. C). It was dark and raining (Tr. II, 23).

Shortly after the agents had positioned themselves (about six or eight rows back in the cornfield), a black

[1] The motion to suppress was denied with an opinion by Chief Judge Martin (See Tr. I, 3–4). It was renewed at the trial before Judge Hemphill, who also denied it after making independent findings of fact and conclusions of law (Tr. I, 7–12). "Tr. I" contains the opinions of both district judges. "Tr. II" will refer to the transcript of the pre-trial motion to suppress; "Tr. III" will refer to the transcript of proceedings at trial. A copy of each is on file with the Clerk of this Court.

Chevrolet came up the driveway and parked a few feet from the edge of the cornfield (Tr. II, 23–24; see Tr. III, 11). The agents recognized the car and had information that it was being used to transport illegal liquor (T. II, 24; see Tr. III, 11). In order to see better, the agents moved forward several rows but remained in the cornfield (Tr. II, 23; see Tr. III, 16). The driver of the car got out and entered the house. After a few minutes, he came outside and stood on the back porch with petitioner and another man. The door to the kitchen was open and a light was on, enabling the agents to see what transpired (Tr. II, 17, 25; Tr. III, 11). Petitioner counted out what appeared to be money and handed it to the driver. The three men then walked to the car. They raised the trunk lid and showed a flashlight inside. The agents saw that the trunk was full of used cola syrup jugs of the type commonly used to transport bootleg liquor. Petitioner removed a gallon jug, shook it, and scrutinized it.[2] At this point the agents left their place of concealment and arrested petitioner as he was holding the jug. Twenty-two additional jugs were found in the open trunk. All contained non-taxpaid whiskey (Tr. II, 25–28; Tr. III, 11–14).

## ARGUMENT

Petitioner does not dispute that the agents had probable cause, based on their prior information and current observations, to make a valid arrest of peti-

[2] The agents testified that this is commonly done to raise a "bead", or foam, on top of the whiskey, from which its proof can be estimated (Tr. II, 28, Tr. III, 14, 31).

tioner for a suspected violation of the liquor laws. Nor does he dispute that, if the arrest was lawful, seizure of the illicit whiskey was within the limits of an incidental search. He contends, however, that the testimony of the agents should have been excluded because the means by which the agents acquired probable cause—*i.e.*, through visual surveillance accomplished after a trespass onto his land—violated his Fourth Amendment rights.

The contention is without merit under traditional principles. In *Hester* v. *United States*, 265 U.S. 57, federal agents trespassed upon the field of defendant's father and from a vantage point observed him hand a bottle of whiskey to another. While holding the trespassory viewing not to be a search, the Court at the same time declared (*id.* at 59):

> [T]he special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects", is not extended to the open fields. The distinction between the latter and the house is as old as the common law. 4 Bl. Comm. 223, 225, 226.

The lower federal courts, apparently following the lead of the Court's citation to Blackstone, thereafter developed the doctrine of the "curtilage"[3] as a means of dealing with the problem of what grounds and properties should be considered within the scope of the Fourth Amendment's protection of the house, as opposed to the "open fields" where a man was implicitly deemed to assume the risk that his conduct

[3] Blackstone, within the pages cited by the Court in *Hester*, discusses the curtilage concept.

might be subject to scrutiny. In a series of cases—some very similar to the instant case and most, as in *Hester,* involving investigations into illicit dealings in liquor—a definition was evolved, enlarging the concept of the protected home area to cover various structures, such as a barn, used in connection with the home or business, as well as other nearby, commonly enclosed locations utilized for family purposes. See, *e.g., Janney* v. *United States,* 206 F. 2d 601 (C.A. 4); *Care* v. *United States,* 231 F. 2d 22 (C.A. 10), certiorari denied, 351 U.S. 932; *United States* v. *Potts,* 297 F. 2d 68 (C.A. 6); compare *Rosencranz* v. *United States,* 356 F. 2d 310 (C.A. 1); *Wattenburg* v. *United States,* 388 F. 2d 853 (C.A. 9). It is clear, however, that a cornfield does not fall within the accepted definition of "curtilage" for Fourth Amendment purposes.

Petitioner does not contend that the agents were within the curtilage. He urges, rather, that *Hester* and the curtilage doctrine were impliedly overruled by *Katz* v. *United States,* 389 U.S. 347, and that, in the circumstances of this case, the surveillance was constitutionally invalid because the agents lacked a search warrant.[4] Compare the claim in *Cothren* v.

[4] In so arguing, petitioner relies on some observations in *Wattenburg* v. *United States, supra,* which support his position. However, *Wattenburg* involved an actual search of property, not a viewing, by agents who intruded into the curtilage surrounding the defendant's motel residence. The court, before announcing (in light of *Katz*) that it believed the more appropriate test should henceforth be whether a search "constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is acces-

*United States,* No. 965, O.T. 1967, certiorari denied, 390 U.S. 949, and *Grimes* v. *United States,* 391 F. 2d 709 (C.A. 5), petition for certiorari pending (No. 93, this Term). It seems evident, however, that *Katz* was not intended to disturb the established law concerning the admissibility of *visual* observations by law enforcement agents and, in any event, that the principles announced in *Katz* are consistent with *Hester* and the curtilage rule. See *Katz, supra,* 389 U.S. at 360–361 (Harlan, J., concurring).

*Katz* imposed a constitutional requirement of a warrant as a precondition to the use of *electronic equipment* by law enforcement officers to overhear a conversation absent the consent of either party thereto, where, in addition, the words were not uttered so as to be "knowingly expose[d] to the public". *Katz, supra,* 389 U.S. at 351. The opinion gives no indication that it was meant to apply to non-electronic surveillance, such as that in *Hester,* which poses a far less pervasive and significant threat to privacy than is presented by electronic overhearing. Petitioner's argument that *Katz* applies to purely visual surveillance would require an interpretation of that case as making substantial inroads upon the old doctrine, upon which *Hester* and many recent decisions of this Court have been based,[5] that use of the eye to

sible to the public", 388 F. 2d at 857, expressly held that the search there was unlawful, under traditional principles, as involving a trespass into the curtilage. *Ibid.* There is thus no conflict, as alleged by petitioner, between *Wattenburg* and the present case.

[5] *E.g., Rios* v. *United States,* 364 U.S. 253; *Ker* v. *California,* 374 U.S. 23, 43; *Harris* v. *United States,* 390 U.S. 234.

view is not a "search" within the meaning of the Fourth Amendment. Far from so holding, *Katz,* as we read it, supports that rule and, indeed, supplies it with an additional rationale—that what is seen by an officer with his own eyes has most often been knowingly exposed to the public by its doer or possessor. This interpretation of *Katz* is buttressed by the Court's citation of *United States* v. *Lee,* 274 U.S. 559, at 563, for the proposition that what "a person knowingly exposes to the public * * * is not a subject of Fourth Amendment protection". *Katz, supra,* at 351. *Lee* involved the viewing of cases of liquor on board a vessel at night with the aid of a searchlight from a pursuing ship. The use of binoculars also has been deemed permissible and not to transform a viewing into a "search". *Lee, ibid.* (dictum); *Hodges* v. *United States,* 243 F. 2d 281 (C.A. 5). The present case concerns the *a fortiori* situation of a viewing with the unaided eye.

Of course, if the viewing with the naked eye is the result of a violation of a Fourth Amendment right, the testimony would still be inadmissible. If, for example, an agent unlawfully secreted himself in a closet in a house, he could not testify to what he saw or heard. The protection afforded by the Fourth Amendment to persons in their "houses, papers, and effects" clearly applies to preserve the rights of individuals against law enforcement agents who trespass without warrant upon the privacy and sanctuary of the home itself, or its appurtenant buildings or land. This, however, is simply to recognize the wisdom of the accommodation which *Hester* and other cases long

ago decreed with respect to surveillances by sight. *Hester,* as amplified by the curtilage doctrine, continues to reflect a fair delineation of the rights safeguarded by the Fourth Amendment with regard to the problem of visual surveillance. Nothing in *Katz* suggests the contrary. In fact, the surveillance here was proper under the very principles which this Court articulated in *Katz.*

Petitioner, who chose to conduct his illegal activities out of doors and in the luminosity of lights under his, or his confederates', control, should not be heard to complain that federal agents, whom he should reasonably have expected to be attempting to uncover evidence of his bootlegging activities, were able to observe what transpired. In these circumstances, it would be stretching reality to hold that petitioner "[sought] to preserve as private" his actions against the risk of revelation to law enforcement officers using only the faculty of sight. See *Katz* v. *United States,* 389 U.S. 347, 351. By acting outside the home or any other enclosure (compare *Katz*), petitioner exposed his conduct to the public and assumed the risk of visual surveillance by persons situated outside the curtilage. The judgment below was thus correct.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

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